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No. 96-1587

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF ALBUQUERQUE,

Petitioner,

vs.

CAROL M. BROWNER, OR HER SUCCESSOR, AS ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Environmental Protection Agency can approve Indian Tribe water quality standards which are not supported by a scientific or rational basis, are adopted for Indian Tribe religious and ceremonial purposes, or both, merely because such standards are more stringent than federal minimum standards?

2. Whether the United States Environmental Protection Agency has violated the establishment clause by requiring the City of Albuquerque to expend taxpayer funds to comply with water quality standards adopted for religious and ceremonial purposes by the Isleta Pueblo?

3. Whether the United States Environmental Protection Agency can force non-Indians outside Indian country and outside fee lands to comply with Indian Tribe water quality standards?

4. Whether the United States Environmental Protection Agency can force non-Indians outside Indian country and outside fee lands to comply with Indian Tribe water quality standards, if such regulations are not supported by a scientific or rational basis and/or are adopted for ceremonial and religious purposes?

5. Whether EPA's prohibition against municipalities invoking EPA's dispute resolution procedures violates the Clean Water Act?

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CONSENT TO FILE AMICUS CURIAE BRIEF

Consent to the filing of this *amicus curiae* brief was granted by Walter Dellinger, Esq., Acting Solicitor General, on behalf of Carol Browner, Administrator of the United States Environmental Protection Agency, and by Bruce S. Garber, Esq., on behalf of the City of Albuquerque.

SUMMARY OF ARGUMENT

This case presents multiple issues of first impression arising from the unprecedented and *ultra vires* attempt by the United States Environmental Protection Agency ("EPA") to

force the City of Albuquerque ("City"), a non-Indian political subdivision located outside Indian Country, to comply with water quality standards ("WQS") adopted by the Isleta Pueblo ("Isleta"), an Indian Tribe, pursuant to the "treatment as a state" ("TAS") amendment to the Clean Water Act ("CWA"), 33 U.S.C. § 1377(e).

In 33 U.S.C. § 1377(e), Congress authorized EPA to treat an Indian Tribe as a state for certain purposes contained in enumerated sections of the CWA and then only "to the degree *necessary* to carry out the objectives" of treating an Indian Tribe as a state. *Id.* (emphasis added). As states cannot enforce either state or federal environmental regulations against Indians in Indian Country, and the United States has long had a policy of maximizing Indian Tribe control over local Tribe affairs, Congress amended the CWA to authorize Indian Tribes to be treated as states so they could develop and enforce environmental regulations *within Indian Country*.

However, by authorizing Indian Tribes to take control of their own environmental affairs, Congress did not authorize EPA to export such regulations and apply them to non-Indians outside Indian Country, including states and their political subdivisions. Such a fundamental -- indeed seminal -- change in the balance of jurisdiction and power between Tribes, EPA and the states/political subdivisions is not only *ultra vires* and contrary to fundamental principles of Federal Indian Law, but also contrary to Congressional intent and legislative history.

Although EPA's unilateral decision to enforce Indian Tribe WQS against non-Indians outside Indian Country is extremely troubling in its own right, the CWA is not the only major federal environmental statutory scheme which has been amended to include a TAS provision, Congress, *using virtually the same language*, enacted TAS provisions in the Safe Drinking Water Act, 42 U.S.C. § 300j-11(b)(1); the Clean Air Act, 42 U.S.C. § 7601(d)(2); the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1235(k); and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9626. Accordingly, the resolution of this

litigation will delineate the fundamental powers and jurisdictional boundaries of EPA, Indian Tribes, and the states/their political subdivisions across the full range of the major federal environmental statutes.

The need to determine whether EPA can enforce Indian Tribe environmental regulations against non-Indians outside Indian Country is urgent and is becoming more so. There are approximately 550 Indian Tribes across the United States (approximately 300 in the continental 48 states) and EPA is actively dispensing grants to an increasing number of these Tribes to facilitate their generation of various environmental regulations, including water quality regulations. Thus, the issues presented are national in scope and are highly likely to arise again repeatedly.

Even worse, in New Mexico alone, grants have been awarded to multiple Tribes on the Rio Grande raising the specter of separate Tribe WQS governing the same body of water. If EPA continues on its present course, these multiple sets of Tribe environmental regulations would all be enforced by EPA against non-Indian political subdivisions outside Indian Country. Municipalities will soon find themselves being forced to comply with multiple Tribe WQS.

Aside from EPA's decision to export Indian Tribe environmental regulations, this litigation also challenges EPA's policy of not reviewing the substance of the Tribe WQS it is exporting, so long as such WQS exceed minimum federal requirements. Thus, EPA approved the Isleta WQS even though they were promulgated for Tribe religious and ceremonial purposes and contained an irrational and scientifically insupportable arsenic standard. The Isleta arsenic standard is in parts per *trillion* which is 1000 times beyond the capacity of the most sophisticated laboratory equipment to detect or measure. It is also far above the naturally occurring level of arsenic in the region. EPA has always conceded, and both the Tenth Circuit and the New Mexico District Court recognized, that the Isleta arsenic standard has no sound scientific basis.

While Congress has empowered Tribes to regulate their own discharges into Tribe waters, EPA has no authority to require non-Indians outside Indian Country to comply with irrational and scientifically unsound Tribe WQS or regulations promulgated for Tribe religious and ceremonial purposes. The latter violates the Establishment Clause.

Finally, EPA's refusal to allow political subdivisions to invoke its dispute resolution mechanism has been challenged. EPA's refusal leaves political subdivisions without any effective dispute resolution process.

Overall, EPA has attempted to create a one way street -- it will export and enforce Indian Tribe WQS and other Tribe environmental regulations to non-Indians outside Indian Country, while Indian Tribes are immune from corresponding state regulations. Given EPA's unprecedented *ultra vires* acts and the high likelihood that they will be repeated both in connection with other Tribes and other federal statutes, the Court should grant the City's Petition to resolve the important issues of first impression presented.

THE AMICI CURIAE ARE VITALLY INTERESTED IN THIS LITIGATION BECAUSE OF THE LIKELIHOOD THAT EPA WILL ENFORCE TRIBE ENVIRONMENTAL REGULATIONS AGAINST NON-INDIAN MUNICIPALITIES

The *amici* consist of the New Mexico Municipal League ("NMML"); other state municipal leagues, including: the Alabama League of Municipalities; South Dakota Municipal League; Nevada League of Cities; League of Wisconsin Municipalities; New York Conference of Mayors; New Jersey League of Cities and the League of Kansas Municipalities (collectively the "State Leagues"); and the International Municipal Lawyers Association ("IMLA").

The NMML and the other State Leagues are associations of incorporated municipalities in their various states. The geographic diversity of the State Leagues, as well as the participation of the IMLA, confirm that the issues presented have

serious national implications. The NMML participated as *amicus curiae* before the Tenth Circuit Court of Appeals.

The pattern of events which triggered the NMML's participation in this litigation as *amicus curiae* is a harbinger of what is about to happen in other states and is of serious concern to the *amici*. In New Mexico, Isleta was the first Tribe to adopt WQS for the Rio Grande. Subsequent to approval of Isleta's WQS, EPA also approved WQS adopted by the Sandia Pueblo and the San Juan Pueblo. The Isleta Pueblo is located just south of the City; the Sandia Pueblo is located just north of the City; and the San Juan Pueblo is located much further north. The Rio Grande flows from north to south. Both the Isleta and Sandia Pueblos are tiny compared to the population and scale of economic activity in and around the City. Thus, the Isleta and Sandia WQS will have far more effect on the City and other New Mexico municipalities than on the pueblos themselves.

Moreover, the Isleta, Sandia, and San Juan Pueblos are not the only Tribes whose boundaries include portions of the Rio Grande. Over merely 150 miles, the Rio Grande traverses the aforementioned pueblos as well as the following pueblos, all of whom could adopt WQS: Cochiti, Picuris, San Idelfonso, San Felipe, Santa Ana, Santa Clara, Santo Domingo, and Taos. Four of these pueblos have received grants from EPA to develop WQS: Picuris, San Idelfonso, Santa Clara, and Taos. In addition, three other pueblos encompass waters which are tributaries of the Rio Grande: Nambe, Tesuque and Pojoaque. These tribes have also received grants to develop WQS. In sum, ten Tribes have either adopted or are in the process of adopting WQS, seven of whom are located on the Rio Grande, and three of whom are on tributaries -- *all* within a 150 mile stretch of the Rio Grande.

The NMML's member municipalities do now or will in the future purchase, finance and operate sewage treatment plants which discharge into the Rio Grande and/or its tributaries at locations upstream and outside the Reservation borders of one or more of the aforementioned Tribes. These member

municipalities include Albuquerque, the City of Santa Fe, the incorporated County of Los Alamos, the City of Farmington, the City of Rio Rancho, the Village of Jemez Springs, the City of Aztec, the City of Bloomfield, Town of Bernalillo, Village of Cuba, and the Village of House (collectively "NMML Burdened Municipalities").

Many of the NMML Burdened Municipalities are upstream from more than one Tribe. For example, Rio Rancho and Bernalillo are upstream and relatively close to both the Isleta and Sandia Pueblos. If the actions of EPA challenged in this litigation are sustained, then all of the NMML Burdened Municipalities would be forced by EPA to comply with all downstream Tribe WQS. As more Tribe WQS are approved by EPA, other NMML member municipalities would be forced to comply. Based on Albuquerque's estimated 250 million dollar cost of attempted compliance with the Isleta arsenic WQS, NMML Burdened Municipalities are likely to face very large costs as well.

The same general pattern exists throughout the country, and in the jurisdictions represented by the State Leagues. Many of their members are located on rivers upstream from Tribes who are in the process of promulgating, or could adopt, WQS which would be enforced and applied by EPA in a manner similar to EPA's enforcement of Isleta's WQS. The foreseeable impact of EPA's actions as sustained by the Tenth Circuit will be to require municipalities in New Mexico and throughout the country -- *who are in full compliance with their states' WQS* -- to expend millions, perhaps billions, of dollars, to meet Tribe WQS which need not have a scientific basis and can be adopted solely for Tribe religious purposes. Given the wide range of federal environmental legislation in which TAS provisions have been inserted, these concerns are not limited to water pollution, but include air quality, solid waste, etc. Given the extremely serious implications of this litigation for the State Leagues' members, they strongly urge the Court to grant the City's Petition.

ARGUMENT

I. UNDER FEDERAL INDIAN LAW, INDIAN TRIBE REGULATIONS CANNOT BE APPLIED TO OR ENFORCED AGAINST NON-INDIANS OUTSIDE RESERVATION BORDERS

Traditionally, Indian tribe jurisdiction was confined to Indian territory, state jurisdiction was confined to non-Indian lands, and neither could exercise jurisdiction over territory within the jurisdiction of the other.[1] Under Federal Indian law, land within reservation borders owned or held in trust for Indians is "Indian Country."[2] Indian tribes have jurisdiction over tribe members and non-Indians in Indian Country. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). A state cannot enforce its own *or federal laws* against Indians in Indian Country in the absence of a clear delegation of authority from Congress. *State of Washington, Department of Ecology v. United States Environmental Protection Agency* ("*Washington*"), 752 F.2d 1465 (9th Cir. 1985).

As a result of land allocation acts, such as the Dawes Act, 25 U.S.C § 331 *et seq.*, large tracts of land on many reservations were conveyed to non-Indians. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* ("*Brendale*"), 492 U.S. 408, 437 (1989). Lands within reservation borders which are owned by non-Indians are "fee lands." *Montana v. United States* ("*Montana*"), 450 U.S. 544 (1981). Many reservations are now "checkerboarded" with Indian country hopelessly intermingled with fee lands. Sly,

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[1] *See Williams v. Lee*, 358 U.S. 217 (1959) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Early in our history, Indian and non-Indian lands were usually physically separate, thus keeping jurisdictional lines relatively distinct. Felix S. Cohen's Handbook Of Federal Indian Law 28-29 (1982 ed.).

[2] Indian Country also includes dependent Indian communities and Indian land allotments, the Indian titles to which have not been extinguished. *See* 18 U.S.C. § 1151. This definition has been applied in a civil context. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975).

EPA And Indian Reservations: Justice Stevens' Factual Approach, 20 Envtl.L.Rep. (News & Analysis) 10429, 10430 (1990).

Generally Tribes lack any inherent sovereign regulatory power over fee lands, and, thus, non-Indians on fee lands are generally exempt from the reach of tribal regulations. *Montana*, 450 U.S. at 565. The *Montana* rule has two limited exceptions: if a non-Indian enters a consensual arrangement with the tribe (*e.g.*, a contract), or, if a non-Indian's activities directly affects the tribe's political integrity, economic security or heath and welfare. *Id.* at 566. Even if one of the exceptions to the *Montana* rule is satisfied, the tribe gains jurisdiction over non-Indians on fee lands only. *Id.*[3]

While the power of Indian tribes to regulate non-Indians on fee lands has been hotly contested, no case could be found which even hinted that general sovereign Indian regulatory powers could be extended outside reservation boundaries to reach non-Indians. *State of Alaska v. Native Village of Venetie* ("*Venetie*"), 856 F.2d 1384 (9th Cir. 1988) (sovereign power of Indian tribes to tax cannot apply outside Indian country).[4]

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[3] Indeed, even the minority Justices in *Brendale* who viewed Indian jurisdiction most broadly conceded that within reservations there may be:

> . . . essentially self-contained, definable, areas in which non-Indian fee lands so predominate that the tribe has no significant interest in controlling land use.

Brendale, 492 U.S. at 448.

[4] *See* Congressional Research Service, American Law Division, Memorandum to Senate Select Committee On Indian Affairs ("C.R.S. Mem.") at 6 (February 21, 1991), (maximum territorial limit of a tribe's authority is reservation boundaries). In very few instances, irrelevant to this litigation, Indian tribes may exercise extraterritorial powers. Tribes may be empowered to govern "dependent Indian communities" because federal law includes them within "Indian country." *Venetie, supra.* However, Indians have no inherent sovereign power to regulate activities of non-Indians outside reservation borders. *Id.*

In short, it is settled that non-Indians outside reservation boundaries are not subject to Indian Tribe police power regulations and that the only dispute over jurisdiction between states and Tribes occurs within the fee lands. It is against this legal backdrop that Congress allowed EPA to treat Indian tribes as states.

II. IN ALLOWING EPA TO TREAT INDIAN TRIBES AS STATES, CONGRESS DID NOT AUTHORIZE EPA TO DISREGARD FEDERAL INDIAN LAW AND APPLY TRIBE REGULATIONS TO NON-INDIANS OUTSIDE RESERVATION BORDERS.

Prior to enacting the TAS provision in the CWA, Congress was well aware that Indian Tribes lacked the funds and experience to administer CWA programs and that, as a result, environmental regulation and enforcement lagged within reservations. C.R.S. Mem. at 8-9 (quoting from the Senate debate in the Congressional Record).[5] To promote Indian environmental programs within reservation boundaries and to enable tribes to receive grants, Congress amended the CWA as follows:

> The Administrator is authorized to treat an Indian tribe as a State for purposes of Subchapter II of this chapter[6] and Sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title *to the degree necessary* to carry out the objectives of this section, but only if. . .
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of

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[5] Congress could have enacted a statute expressly delegating to states the power to enforce State and federal environmental laws within Indian country. *Washington, supra.* However, such a delegation would have been inconsistent with the federal policy of encouraging Indian self-government. *See EPA Policy For The Administration Of Environmental Programs On Indian Reservations (Nov. 8, 1984).*

[6] Subchapter II contains many of the Federal grant programs.

> water resources held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe. . . or *otherwise within the borders of an Indian reservation*. . . .

33 U.S.C. § 1377(e) (emphasis added).

Congress' intention to deny EPA authority to apply Indian WQS to non-Indians outside reservation borders is clearly expressed in the Act's legislative history. Senator Burdick stated:

> Those water quality standards set by Indian tribes and *accepted by EPA will not be used off reservation borders.*

133 Cong. Rec. S 753 (emphasis added).

Moreover, the precise issues raised in this litigation were addressed in a Memorandum to Rep. Morris K. Udall in connection with the proposed amendment to the CWA:

> [N]othing . . . in the existing Clean Water Act or in any provision of H.R.1 gives the EPA administrator or the Tribes the power to force States to alter their approved water quality standards or their operations under an approved plan in order to accommodate higher Tribal water quality standards. . .
>
> We can find nothing in the Clean Water Act as proposed to be amended by H.R.1 which will in any way expand substantive Indian Water Rights which will expand or enhance the power of Indian Tribes *to effect off-reservation activity which might degrade or spoil on-reservation water quality.*

133 Cong. Rec. S 754 (emphasis added).

Yet another reference, even more specifically correlated to the facts of this case, was made by Senator Hecht during the debate on the proposed amendments:

> In Nevada ... the Cities of Reno and Sparks have invested millions of dollars in water treatment facilities ... the Pyramid Lake Indian Reservation is located down stream and the tribes and the cities are involved in difficult legal battles over water quality.
>
> I am convinced by the chairman's very helpful statement that *Nevada's* water rights and *standards are not put into any jeopardy by this legislation. . .*

133 Cong. Rec. S 1021 (emphasis added).

In essence the legislative history set forth above reveals a series of specific questions in the congressional record from western states' senators requesting assurances that the TAS provisions will not affect off-reservation water quality regulations. All the assurances given by the sponsoring members were to the effect that the TAS provisions would simply give Tribes the powers they needed to regulate their own activities and activities within Indian Country. The decision of the Tenth Circuit ignores this clear congressional intent.

Moreover, in EPA's commentary to its regulations, EPA conceded, after reviewing *Montana* and *Brendale*, that Congress did not expand Indian authority to regulate nonmembers and *required* EPA to treat Indian tribes as states within the rules of Federal Indian law:

> EPA believes that if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee reports. . . EPA believes that it should not find that the statute expands or limits the scope of Tribal authority *beyond that inherent in the Tribe absent an express indication of Congressional intent to do so...*
>
> *EPA believes that Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles*

> *of Federal Indian law*. EPA believes that this approach will best effectuate the overall purposes of the statute.

58 Fed. Reg. 8172, 8176 (1993) (emphasis added).

Thus, EPA concedes that it has no power to act in a manner which violates Federal Indian law. Accordingly EPA requires an Indian tribe seeking to regulate non-Indians' activities on fee lands to affirmatively establish its jurisdiction by satisfying the second exception to the Montana rule. *See* 40 C.F.R. § 131.8. Even though EPA concedes that it is bound by Federal Indian law in implementing the CWA TAS provisions, EPA illogically contends that the same legislation *forces it* to apply Indian environmental regulations to non-Indians outside reservation borders - - where no tribe has ever had jurisdiction under Federal Indian law. EPA attempts to find support for its *ultra vires* exercise of power within *Arkansas v. Oklahoma* ("*Arkansas*"), 503 U.S. 91 (1992), a case having nothing to do with Indian WQS or the Act's "treatment as a state" provision.

In *Arkansas*, EPA's authority to require a discharger seeking a National Pollution Discharge Elimination System ("NPDES") permit in one state to meet the anti-degradation element of a downstream state's WQS was upheld. Now EPA contends it must substitute the Isleta WQS for the downstream state's WQS in the *Arkansas* fact pattern because it is "treating Isleta as a state".

EPA's attempted mechanistic substitution ignores the clear language of the Act which authorizes EPA to treat Isleta as a state only for certain particular enumerated purposes, to the degree necessary, and in conformity with Federal Indian law. *See* 33 U.S.C. § 1377(e) and 58 Fed. Reg. 8172, 8176 (1993). Incorporation of tribe WQS into the NPDES permit of a non-Indian municipality meets none of those criteria.

EPA has argued that 33 U.S.C. § 1311(b)(1)(C), not other provisions of law, purportedly mandates incorporation of the Isleta WQS into Albuquerque's NPDES permit. In 33 U.S.C.

§ 1377(e), Congress enumerated the specific instances when EPA could treat a tribe as a state by listing the various sections of the Act for which such treatment was authorized. Congress omitted 33 U.S.C. § 1311(b)(1)(C) from the 33 U.S.C. § 1377(e) list. Thus, the Act does not authorize EPA to treat a Tribe as a state for purposes of incorporating tribe WQS into the NPDES permit of an upstream non-Indian city outside the reservation boundaries.

Moreover, incorporation of a tribe's WQS into a non-Indian municipality's NPDES permit is not necessary to carry out the objectives of 33 U.S.C. § 1377. Indeed, Isleta itself has never sought to force its standards on Albuquerque and omission of the Isleta standards from Albuquerque's NPDES permit will in no way interfere with the purpose of 33 U.S.C. § 1377 - - to give Isleta and other Indian tribes the means to control activities within reservation boundaries.

Finally, and most importantly, substituting Isleta's WQS for the downstream state's WQS in the *Arkansas* fact pattern, will cause Isleta's WQS to be applied to non-Indians outside reservation borders in clear violation of Federal Indian law. Nothing in *Arkansas* even remotely suggests that this Court addressed, no less altered, the established jurisdictional limits of Federal Indian law. While *Arkansas* allows EPA to require a discharger in one state to comply with a downstream state's anti-degradation element of its WQS, nothing in *Arkansas* allows EPA to substitute an Indian tribe for the downstream state and apply tribe WQS to non-Indians in violation of Federal Indian Law.

The only rationale advanced by the Tenth Circuit in support of its holding to the contrary, is that EPA is exercising its own authority in requiring the City to comply with Isleta's WQS. However, nowhere does the Tenth Circuit address, no less explain, how such a result can be harmonized with EPA's own concession that it must comply with Federal Indian Law. In reality, the Tenth Circuit, perhaps feeling chastened after the castigation delivered in this Court's opinion in *Arkansas* concerning deference to EPA, has now swung to the opposite

extreme -- it has upheld a clear violation of Federal Indian Law by EPA. This Court should mandate EPA's compliance with Federal Indian Law.

III. THE CLEAN WATER ACT CLEARLY AND UNAMBIGUOUSLY PROHIBITS INDIAN TRIBES FROM ADOPTING WATER QUALITY STANDARDS WHICH ARE MORE STRINGENT THAN FEDERAL MINIMUM STANDARDS.

The court below erred in finding an ambiguity in the TAS provision of the CWA. Citing *Chevron, USA, Inc. v. Natural Resources Defense Council* ("*Chevron*"), 467 U.S. 837, (1984), the lower court applied this Court's two step approach to judicial review of agency interpretations of acts of Congress. The first step requires the court to look to the clear and unambiguous intent of Congress. A careful reading of the Act, including the TAS provision establishes the clear and unambiguous intent of Congress that Indian Tribes not be empowered to adopt WQS more stringent than federal Standards. Indeed, Congress took specific care to assure that such was the case, realizing that allowing more stringent standards would be disastrous to the uniformity of the comprehensive system of regulating water quality established under the Act.

Under *Chevron*: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question before it, that intention is the law and must be given effect." *Id*, 467 U.S. at 843 (n.9). When EPA impermissibly alters the statutory scheme, as established in the Act and its legislative history, EPA's acts must be set aside. *Natural Resources Defense Counsel Inc. v. USEPA*, 966 F.2d 1292, 1305 (9th Cir. 1992).

The TAS provision clearly specifies those purposes for which Indian Tribes will be treated as a state under the Act. Conspicuously absent from 33 U.S.C. § 1377(e) is 33 U.S.C. § 1370, which is the authority for states to adopt standards more stringent than those adopted by EPA. Since the sole authority for such stricter standards has specifically been withheld from Tribes, the clear language of the Act reveals

Congress' intent that Indian Tribes not be allowed to adopt standards more stringent than those adopted by the federal government.

EPA has attempted to justify its interpretation of Section 1370 by indicating that it is simply a restatement of the inherent sovereign power of States to adopt more stringent standards. The Tenth Circuit adopted this rationale and held that the omission of any reference to § 1370 in the TAS provision does not deprive Indian Tribes of authority to adopt more stringent standards. However, the Tenth Circuit decision ignores a fundamental distinction between Indian sovereignty and State sovereignty. The sovereignty of Indian Tribes exists only at the sufferance of Congress and is subject to complete defeasance. Congress did not change that rule by enacting TAS provisions. Thus, when Congress adopted a TAS provision excluding Section 1370, Congress consciously withheld from Indian Tribes the authority to adopt more stringent standards and thus deprived the Indian Tribes of any potential power to the contrary.

Indeed, the Tenth Circuit decision turns the proper analysis of the TAS provision on its head by allowing Indian Tribes to adopt WQS that are not consistent with the purposes of the Act, are technically and scientifically arbitrary and insupportable, and require millions of dollars in expenditures to achieve a theoretical water quality level with little if any incremental benefit. The intent of Congress in adopting the TAS provision was to allow Indian Tribes to address their own problems and take control of their own environmental affairs. In so doing, Congress wisely precluded Indian Tribes from adopting WQS that are more stringent than those adopted by the federal government, apparently in recognition that the adoption of more stringent WQS could wreak havoc on the comprehensive system of water quality in this country by creating a multi-tiered system which would be driven by Indian Tribes.

Indeed, since EPA has stated unequivocally that it will require all upstream non-Indian municipalities to comply with Tribe WQS, it is clear that Tribes need not ever take an

affirmative step to enforce their WQS against upstream communities. They can simply wait for EPA to enforce the Tribe WQS. This is not at all how Congress intended the system to work.

CONCLUSION

All other issues have been fully addressed by the City and the *amici* adopt and support the arguments set forth in the City's Petition. For the reasons stated in the Petition, and for the reasons stated hereinabove, *amici* support the City's Petition and request that the Court issue the requested Writ of Certiorari.

Respectfully submitted,

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